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ROACH v. COMMONWEALTH 1996 WL 88107 (Va. 1996) Supreme Court of Virginia

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ROACH v. COMMONWEALTH

1996 WL 88107 (Va. 1996)
Supreme Court of Virginia

FACTS

On December 3, 1993, Mary Ann Hughes was shot and killed in her home. The cause of death was a single shotgun wound to the chest.¹ Three days later Steve Edward Roach, Hughes's next-door-neighbor, confessed to the killing.² Roach, who was 17 years old at the time, was tried as an adult and convicted of capital murder of Mary Ann Hughes in the commission of robbery while armed with a deadly weapon. At the penalty phase of the capital murder trial, the court struck the evidence as to the "vileness" predicate of a capital sentence, but submitted the case to the jury upon the "future dangerousness" predicate. The jury deter-

mined that the "future dangerousness" predicate was satisfied and sentenced Roach to death.³

HOLDING

On direct appeal, the Supreme Court of Virginia upheld Roach's conviction and death sentence. After conducting the statutorily mandated review of the death sentence,⁴ the court likewise declined to set aside the sentence.⁵ The court held, *inter alia*,⁶ that the trial court had not erred by refusing to grant several portions of Roach's motion for a bill of particulars,⁷ nor had the trial court erred in refusing to set aside the

¹ *Roach v. Commonwealth*, No. 951416, 1996 WL 88107, *1 (Va. Mar. 1, 1996).

² *Id.* at *3.

³ Roach was also tried on indictments charging him with the use of a firearm in the commission of murder, and robbery by violence to the person of Mary Ann Hughes. *Id.* at *1.

⁴ Va. Code Ann. § 17-110.1 (1995).

⁵ *Roach*, 1996 WL 88107 at *16.

⁶ The court rejected some of the defendant's assignments of error in brief, conclusive language. Defense counsel is nevertheless to be commended for preserving these numerous issues for later habeas review, particularly federal habeas review. The court's rulings provide little if any guidance because they apply broad, settled principles of law to facts that are specific to the case being reviewed. Issues in this category that will not be addressed in this summary include: (1) the denial of an instruction informing the jury of Roach's 25-year period of parole ineligibility; (2) the refusal to limit evidence of juvenile and adjudicated conduct at sentencing; (3) the failure of Virginia's transfer statute to provide for individualized consideration of a juvenile's moral culpability and maturity; (4) that the sentencing verdict form renders the jury's option of imposing a life sentence unconstitutionally vague and obscures mitigation evidence; (5) the failure of Virginia's death penalty statutes to give meaningful guidance to jurors that they may impose a death sentence only if they determine beyond a reasonable doubt that aggravating circumstances outweigh mitigating circumstances; (6) that Virginia's death penalty statutes violate defendants' rights under the Eighth and Fourteenth Amendments to the United States Constitution by allowing the jury to find "future dangerousness" based upon adjudicated crimes; (7) That Virginia's capital murder and death penalty statutes as administered are unconstitutional for every reason cited in *Furman v. Georgia*, 408 U.S. 238 (1972); and (8) the failure of Virginia's death penalty statutes to provide defendants meaningful appellate review and the denial of equal protection and due process because of the single tier of appellate review of death sentences. *Id.* at *6. Other issues that were preserved but that will not be discussed in this summary include: (1) that the statutes defining the authority of juvenile intake officers violates the separation of powers clauses of the Virginia Constitution because intake officers are employees of the Department of Youth and Family Services, an executive agency, and are constitutionally prohibited from exercising the judicial powers of determining probable cause, issuing petitions or criminal warrants, or issuing detention orders; *Id.* at *6-7. (2) that the circuit court only acquired jurisdiction to try Roach only for the lesser included offense of first degree murder because the juvenile court did not render a probable cause determination concerning the presence of

aggravating circumstances supporting imposition of the death penalty; *Id.* at *8. (3) the motion for a change of venue on the basis that the crime, a "high profile" murder in a rural setting, rendered the trial court unable to empanel an impartial jury, as evidenced by widespread pretrial publicity that was prejudicial and the facts that greater than 50 percent of the jury pool was familiar with the defendant, the victim or her family, the Commonwealth's Attorney or witnesses and that 31 jurors were stricken for cause, including many who were stricken because of bias for or against the accused or the prosecution; *Id.* at *9-10. (4) the refusal to strike for cause juror Breeden who had been represented in a legal matter by the Commonwealth's Attorney and who regarded the Commonwealth's Attorney as his personal attorney; *Id.* at *10. (5) that the jury had prematurely begun deliberations during the penalty phase of the trial; *Id.* at *11. and (6) the trial court's alleged error in finding that no good cause had been shown to set aside the death sentence and impose a sentence of life imprisonment. *Id.* at *15.

Finally, the issue of Roach's claim that his confession should have been suppressed as being involuntary will not be discussed other than to point out that the Supreme Court of Virginia arguably overstated its obligation to defer to the trial judge's determination as to the voluntariness of Roach's confession, in that such determinations are mixed questions of law and fact and are not entitled to deference. *Id.* at *8-9. This issue is analogous to *Thompson v. Keohane*, 116 S. Ct. 457 (1995) (whether defendant is in custody and therefore entitled to *Miranda* warning prior to interrogation is mixed question of law and fact that must be independently resolved without presumption of correctness by federal court on habeas review).

The Supreme Court of Virginia also found that Roach had waived his claims of error that (a) Virginia's juvenile transfer statute is unconstitutional as applied, (b) the trial court erred in overruling Roach's motion to prohibit the imposition of the death penalty and to strike the capital murder charge on the grounds that the post-sentence report infringed upon his right to due process, to confront his accusers, to be free from cruel and unusual punishment, and to effective assistance of counsel, and (c) Virginia's death penalty statute, as administered, denies capital defendants effective assistance of counsel. *Roach*, at *5, n.3. It is important to note how easily claims of error can be deemed defaulted. Virginia's stringent default and waiver rules require that all claims be properly raised at trial, assigned as error, and argued in brief. Va. Sup. Ct. R. 5:17(c)(4) (1995). For a thorough treatment of Virginia's default and waiver doctrine see Groot, *To Attain The Ends Of Justice: Confronting Virginia's Default Rules In Capital Cases*, Capital Defense Digest, Vol. 6, No. 2, p. 44 (1994).

⁷ *Roach*, 1996 WL 88107 at *8.

verdict of capital murder based on the alleged absence of evidence corroborating Roach's confession that he was the "triggerman."⁸ The court also held that the trial court had not erred in refusing to instruct the jury on the meaning of the word "probability" as used in the "future dangerousness" aggravator,⁹ and that the trial court's refusal to instruct the jury that Roach, if sentenced to life in prison, would be ineligible for parole for 25 years had not violated Roach's Fourteenth Amendment right of equal protection.¹⁰ The Supreme Court of Virginia also held that the trial court was not required to articulate a standard of proof for determining "future dangerousness,"¹¹ and that the proof of Roach's "future dangerousness" was sufficient.¹² Finally, the court held that Roach's death sentence was not imposed under the influence of passion, prejudice or other arbitrary factors, nor was it excessive or disproportionate.¹³

ANALYSIS/APPLICATION IN VIRGINIA

I. The Finding of "Future Dangerousness"

A. Evidence Considered; Sufficiency

The Supreme Court of Virginia concluded that the jury had sufficient evidence from which to find, beyond a reasonable doubt, that there was a probability that Roach would commit criminal acts of violence that would constitute a continuing serious threat to society. In reaching this conclusion the court emphasized that the facts and circumstances surrounding the capital murder alone may be sufficient to support a finding of "future dangerousness."¹⁴ The court reasoned that since Roach shot at point-blank range a defenseless, 70-year-old neighbor who had always been kind to him, then walked past her body, robbed her of her money and car keys, and left her lying on the floor simply because he wanted her money, the jury could conclude that Roach placed little value on human life and was willing to kill even a defenseless friend in order not to be identified as the perpetrator of a robbery. However, the facts that the court seized upon to support the finding of future dangerousness were facts and evidence that are more appropriately considered as to "vileness." The "vileness" predicate was stricken as a matter of law by the trial judge and was not even put to the jury, ostensibly because there was insufficient evidence to support a finding of "vileness."¹⁵ Yet the court simply converted this evidence into a showing of "future dangerousness." Given that this evidence was insufficient for a finding of "vileness" to which it was more appropriately directed, one might expect the same evidence to be insufficient to support a finding of the "future dangerousness" predicate. Furthermore, "future dangerousness" as upheld by the court neither narrows the class of murderers eligible for a sentence of death, nor provides guidance to jury discretion. The court determined that the jury, using the "vileness" evidence, could have reasonably concluded that Roach placed little value on human life and thus found beyond a reasonable doubt the probability that Roach posed a continuing serious threat to society. But what murderer does value human life? A juror could reasonably conclude that any murderer placed little value on human life and thus find "future dangerousness."

The Supreme Court of Virginia also pointed to Roach's "escalating pattern of criminal behavior." The court highlighted the seven-month

period before the murder during which time Roach committed a burglary, two automobile larcenies and violated a condition of his probation. The court found that "given Roach's escalating pattern of criminal behavior culminating in the murder of Mrs. Hughes, the jury had sufficient evidence" to support a finding of "future dangerousness." This reasoning is also problematic, however, because under the court's rationale, all capital murderers with petty criminal histories have an escalating pattern of criminal behavior. The court also interpreted Roach's previous criminal behavior as indicating a broad potential for violence. The court stated that although none of these incidents involved any actual or threatened violence, all four acts involved the potential for violence. The court went so far as to state that it was only "fortuitous circumstance" that Roach's burglary did not involve violence.¹⁶ If the potential for violence is inherent in crimes such as burglary, auto theft, or carrying a weapon in violation of probation, and such a criminal history is sufficient to support a finding of "future dangerousness" even in the face of expert testimony that the defendant's record showed no pattern towards violence,¹⁷ then a jury could find that any capital defendant who had been previously convicted of such a crime should be sentenced to death based on the threat posed to society. The court emphasized that burglary involves inherent dangers to personal safety, the danger that the intruder will harm the occupants in attempting to perpetrate the intended crime or to escape and the danger that the occupants will in anger or panic react violently to the invasion, thereby inviting more violence.¹⁸ But such potentially violent criminal conduct ought not be sufficient to support a finding of "future dangerousness" because many crimes involve similar inherent potential for violence and a juror could find that any capital defendant with a prior record of non-violent crimes as relatively minor as breaking and entering or even trespassing poses a future danger and thereby warrants a sentence of death. Thus, neither the court's consideration of the offense itself, nor the court's interpretation of Roach's past behavior narrowed the field of those capital defendants who are eligible for a sentence of death, or provided guidance to the jurors in choosing whether to impose a death sentence or life imprisonment.

The court used this history of potentially violent criminal conduct to further support the finding of "future dangerousness" despite the testimony of Dr. Gary Lee Hawk, a forensic psychologist appointed by the court. Dr. Hawk testified that there was no pattern of violent behavior in Roach's life. The court dismissed Dr. Hawk's testimony because "the jury was entitled to weigh this opinion in conjunction with all the evidence of Roach's criminal behavior[.]"¹⁹ But, in emphasizing the jury's ability to weigh contradictory evidence, the court downplayed the question of the sufficiency of the evidence to support the jury's finding.

B. Scope and Reach of "Future Dangerousness"; Appellate Court's Duty to Confine

Central to the issue of sufficiency of the jury's finding of "future dangerousness," is the question: "sufficient to establish what?" Roach claimed that, because the Supreme Court of Virginia has never reversed a death sentence based on insufficiency of evidence of "future dangerousness," Virginia case law articulates no standards to confine the reach

⁸ *Id.* at *11.

⁹ *Id.* at *12.

¹⁰ *Id.* at *12-13.

¹¹ *Id.* at *13.

¹² *Id.* at *13-14.

¹³ *Id.* at *15-16.

¹⁴ *Id.* at *14 (citing *Murphy v. Commonwealth*, 246 Va. 136, 145, 431 S.E.2d 48, 53, *cert. denied*, 114 S. Ct. 336 (1993)).

¹⁵ *Id.* at *1.

¹⁶ *Id.* at *14, n.8. The court opined that the fact the premises were unoccupied did not change its analysis but made no findings about Roach's knowledge or lack thereof regarding occupancy or his intent towards any possible occupants. *Id.*

¹⁷ Roach presented such testimony. *Id.* at *5.

¹⁸ *Id.* at *14 (citing *Yeatts v. Commonwealth*, 242 Va. 121, 140, 410 S.E.2d at 254, 266 (1991), *cert. denied*, 503 U.S. 946 (1992)).

¹⁹ *Id.* at *15.

of the "future dangerousness" factor and that such standards must be employed.²⁰ The court rejected this claim. The court based its rejection on the conclusion that the requirement of individualized consideration of the defendant and the crime renders unnecessary the pronouncement of precise requirements for a finding of "future dangerousness." While the court admitted that the standards are imprecise it pointed out that defendants are protected from an unsupported finding of "future dangerousness" by appellate review of the sufficiency of the jury's finding.²¹ However, as Roach pointed out, the Supreme Court of Virginia has never reversed a death sentence based on insufficiency of evidence of "future dangerousness." The less than serious review in the instant case is a perfect example. The standard for finding "future dangerousness" is admittedly imprecise, yet the court, reviewing such findings, has never reversed a death sentence due to insufficiency of the evidence of "future dangerousness." Therefore, it is likely that there is, in reality, no vigorous review conducted of the sufficiency of the finding of "future dangerousness" and its reach is potentially limitless.

C. Vagueness in the Aggravating Factor

An instruction to the jury defining "probability" as it relates to the finding of "future dangerousness" might have alleviated at least some of the deficiencies in the application of the factor. Roach asked for, and was denied, such an instruction. Roach claimed that the trial court erred by refusing to give his proffered instruction. The Supreme Court of Virginia upheld the denial. The court cited *Mickens v. Commonwealth*²² for the proposition that "probability" as it appears in the "future dangerousness" predicate is not ambiguous.²³ However, the *Mickens* court, in finding that the term "probability" was not unconstitutionally vague, cited Virginia case law defining "probability," as used in the "future dangerousness" factor, as: "a likelihood substantially greater than a mere possibility" that an accused would commit violent acts in the future. . . ."²⁴ This definition of "probability" is precisely the jury instruction that Roach requested. The Supreme Court of Virginia's ruling that Roach was not entitled to such an instruction appears to contradict the spirit if not the letter of the statutory mandate that "[a] proposed jury instruction . . . which constitutes an accurate statement of the law applicable to the case, shall not be withheld from the jury solely for its nonconformance with the model jury instructions."²⁵

Furthermore, in *Mickens* and in *Smith v. Commonwealth*,²⁶ the court did not hold that the term "probability" as used in the "future dangerousness" predicate was unambiguous in all cases; rather, the court simply determined that the term "probability" was not vague when the defendant's criminal history sufficiently predicted "future dangerous-

ness." The *Smith* court explained, "[Where] the [capital] defendant has been previously convicted of 'criminal acts of violence,' i.e., serious crimes against [a] person committed by intentional acts of unprovoked violence, there is a reasonable 'probability' . . . that he would commit similar crimes in the future."²⁷ However, Roach had not previously committed such acts of violence, and in a case such as *Roach*, "probability," without the *Mickens* definition, is even more vague and ambiguous.

II. Proportionality Review

Under the authority of Virginia Code section 17.1-110.1.E, defense counsel had assembled an appendix to the appellant's brief, compiling seventy-two Virginia capital cases, fifty-eight of which resulted in a sentence of life imprisonment. The appendix compared the facts of these cases to Roach's circumstances in support of the claim that Roach's death sentence was excessive or disproportionate to the penalty imposed in similar cases considering both the crime and the defendant.

In conducting proportionality review the court claimed to have considered "whether other sentencing bodies in this jurisdiction generally impose the supreme penalty for comparable or similar crimes, considering both the crime and the defendant."²⁸ The court then chose to ignore the bulk of appellant's appendix and compared Roach's sentence to the sentence imposed in *Chichester v. Commonwealth*,²⁹ *Chandler v. Commonwealth*,³⁰ and *Joseph v. Commonwealth*.³¹ The evidence in all three of these cases appears to be more aggravated and less mitigated than in *Roach*. In *Chichester*, the defendant and an accomplice extensively prepared for, and carried out, the armed robbery of a pizza restaurant and the defendant shot and killed an employee at the restaurant. The defendant had previously committed armed robbery at another pizza restaurant during which he attempted to shoot an employee in the head.³² Furthermore, it appears that at the penalty phase, the defendant in *Chichester* presented little, if any, evidence in mitigation.³³ In *Chandler*, the defendant and four accomplices conspired to commit armed robbery of a convenience store. The defendant also shot a store employee in the face, saying "boom, boom" as he did so.³⁴ The defendant subsequently threatened to kill anyone who hurt him or reported him to the police, and specified that he would "do it slowly so they would suffer."³⁵ The defendant had previously committed assault and battery, armed robbery, and several other offenses. While serving an earlier term in prison, the defendant had also assaulted another inmate.³⁶ Furthermore, the defendant presented "little or no evidence of a mitigating nature."³⁷ In *Joseph*, the defendant and an accomplice committed armed robbery of a sandwich shop and the defendant killed a store employee by shooting the employee in the back while the employee lay face down on the floor.³⁸

²⁰ *Id.* at *13. If the "future dangerousness" factor is not confined by the Supreme Court of Virginia to a scope that would not include all capital murderers, then it is constitutionally infirm for the same reasons the application of the "vileness" factor was invalidated in *Godfrey v. Georgia*, 446 U.S. 420 (1980).

²¹ *Roach*, 1996 WL 88107 at *13.

²² 247 Va. 395, 442 S.E.2d 678, *vacated on other grounds*, 115 S. Ct. 307 (1994).

²³ *Roach*, 1996 WL 88107 at *12 (citing *Mickens*, 247 Va. at 403, 442 S.E.2d at 684).

²⁴ *Mickens*, 247 Va. at 403, 442 S.E.2d at 684 (quoting *Smith v. Commonwealth*, 219 Va. 455, 248 S.E.2d 135 (1978), *cert. denied*, 441 U.S. 967 (1979)).

²⁵ Va. Code Ann. § 19.2-263.2 (1995).

²⁶ 219 Va. 455, 248 S.E.2d 135 (1978), *cert. denied*, 441 U.S. 967 (1979).

²⁷ *Smith*, 219 Va. at 477-78, 248 S.E.2d at 148-49 (emphasis added).

²⁸ *Roach*, 1996 WL 88107 at *15 (quoting *Jenkins v. Commonwealth*, 244 Va. 445, 461, 423 S.E.2d 360, 371 (1992), *cert. denied*, 507 U.S. 1036 (1993)).

²⁹ 248 Va. 311, 448 S.E.2d 638 (1994), *cert. denied*, 115 S. Ct. 1134 (1995).

³⁰ 249 Va. 270, 455 S.E.2d 219, *cert. denied*, 116 S. Ct. 233 (1995).

³¹ 249 Va. 78, 452 S.E.2d 862, *cert. denied*, 116 S. Ct. 204 (1995).

³² *Chichester*, 248 Va. at 314-17, 448 S.E.2d at 642-43.

³³ *Id.* at 318-19, 448 S.E.2d at 644.

³⁴ *Chandler*, 249 Va. at 274, 455 S.E.2d at 221-22.

³⁵ *Id.* at 282, 455 S.E.2d at 226-27.

³⁶ *Id.* at 282, 455 S.E.2d at 226.

³⁷ *Id.* at 283, 455 S.E.2d at 227.

³⁸ *Joseph*, 249 Va. at 81-82, 452 S.E.2d at 865.

Twice before, Joseph had committed armed robbery of a convenience store and abducted convenience store employees. Joseph had also been convicted for assaulting a police officer.³⁹ Although Joseph presented evidence in mitigation of death, this evidence does not appear to have been as extensive as the mitigation evidence introduced by Roach.⁴⁰ Thus, it appears that the Supreme Court of Virginia, in conducting its proportionality review, ignored substantial variances in the level of aggravating circumstances and failed to consider evidence in mitigation. None of the defendants in the cases the court cited offered the extensive evidence in mitigation that Roach had, but all three faced much greater aggravating evidence. Furthermore, none of the defendants were minors at the time they committed their capital murders.

Although the Supreme Court of Virginia's statutory obligation to review death sentences is independent of any input by appellants, defense counsel are urged to include their own proportionality review comparisons in an appendix to appellant's brief. These comparisons then become part of the record for review, not only by the Supreme Court of Virginia, but by federal courts reviewing the claim that Virginia does not provide constitutionally required meaningful appellate review.⁴¹

III. Denial of the Motion for Bill of Particulars

Roach filed a motion for a bill of particulars requesting the court to direct the Commonwealth to identify all of the grounds on which it contended the defendant was guilty of capital murder, any and all evidence on which it intended to rely for a conviction upon the charge of capital murder, the aggravating factors upon which it intended to rely in seeking the death penalty, the specific components of "vileness" on which it intended to offer evidence, every narrowing construction of the "vileness" factor on which it intended to offer evidence, any unadjudicated allegations of misconduct by the defendant upon which it intended to offer evidence, any circumstances of the offense it contended were relevant to proof of the "future dangerousness" factor, and any and all evidence on which it intended to rely in support of the aggravating factors identified or in support of its contention that death is the appropriate punishment for the defendant. The trial court granted the portion of the motion that called for the Commonwealth to identify unadjudicated conduct and circumstances of the offense which are relevant to the "future dangerousness" factor. The trial court denied the remainder of the motion, however. The Supreme Court of Virginia found that a defendant is not entitled to a bill of particulars as a matter of right and that the trial court has discretion in determining whether to require the Commonwealth to file a bill of particulars.⁴² The court held that because the indictment gave the defendant sufficient notice of the nature and character of the offense charged such that he could make his defense, the bill of particulars was not required and the trial court did not abuse its discretion in denying the balance of Roach's motion.⁴³ The indictment upon which Roach was tried gave no notice other than that Roach was alleged to have committed "capital murder by the willful, deliberate, and premeditated killing of Mary Ann Hughes in the commission of robbery while armed

with a deadly weapon[.]"⁴⁴ Obviously, the indictment differed from the requested bill of particulars in that it gave no notice of the aggravating factors or of any evidence intended to support the aggravating factors, or, generally, to support the contention that death was the appropriate punishment for Roach. Yet such notice would seem to be essential to a defendant's ability to make his defense. For example, Roach had no notice that the aggravating circumstances which would support his death sentence included the potential for violence inherent in his otherwise nonviolent prior misconduct, the alleged pattern of escalation in potential violence in Roach's misconduct, the allegation that he killed Hughes to avoid being identified and the facts surrounding the killing itself. In making his case against death, Roach cannot reasonably have known the importance of challenging such things. Although the Supreme Court of Virginia continues to reject the claim that capital defendants are entitled to discover the Commonwealth's case in order to defend against the state's case for death, defense counsel are urged to continue to include the claim. It may one day bear fruit.⁴⁵

IV. Simmons Issue

During the penalty phase of the trial, after the jury had been instructed but before it began deliberating, one juror asked the trial court, "Does life in prison mean with no chance of parole or truly life in prison, or is he eligible for parole?" The trial court gave the jury an additional instruction stating, "Having found the defendant guilty, you should impose such punishment as you feel is just under the evidence and within the instructions of the Court. You are not to concern yourself with what may happen afterwards."⁴⁶ Roach argued, unsuccessfully, that the United States Supreme Court's holding in *Simmons v. South Carolina*⁴⁷ required the trial court to instruct the jury as to Roach's period of parole ineligibility and preserved this issue for appeal. The Supreme Court of Virginia adopted the narrowest reading of *Simmons* when it determined that capital defendants are entitled to instruct the jury as to their parole ineligibility only when "future dangerousness" is in issue and only when they are ineligible for parole for life.⁴⁸

In addition, Roach argued that refusal to inform the jury that if sentenced to life in prison he would not be eligible for parole consideration for 25 years constituted a denial of his Fourteenth Amendment right to equal protection under the law. Roach's equal protection claim was that capital defendants with more aggravated prior records are more likely to be ineligible for parole and are thus entitled to a jury instruction on this parole ineligibility. These capital defendants are more likely to be spared a sentence of death by a jury assured of their ineligibility for parole. At the same time, capital defendants who have virtually clean or less aggravated prior records are not entitled to a similar instruction informing the jury of the period of their parole ineligibility and are thus less likely to be spared a death sentence. This disparate treatment leads to unlawful discrimination between similarly situated capital defendants. The court determined that Roach's right to equal protection was not violated because classifications based on parole eligibility are not

³⁹ *Id.* at 88, 452 S.E.2d at 869.

⁴⁰ *Id.* at 87-88, 452 S.E.2d at 868.

⁴¹ *Pulley v. Harris*, 465 U.S. 37 (1984) (reiterating holding of *Furman v. Georgia*, 408 U.S. 238 (1972), that some meaningful appellate review is required of a capital conviction and sentence).

⁴² *Roach*, 1996 WL 88107 at *8 (citing *Quesinberry v. Commonwealth*, 241 Va. 364, 372, 402 S.E.2d 218, 223, cert. denied, 502 U.S. 834 (1991)).

⁴³ *Id.* (citing *Wilder v. Commonwealth*, 217 Va. 145, 147, 225 S.E.2d 411, 413 (1976)).

⁴⁴ *Id.* at *8, n.6.

⁴⁵ The issue is essentially the same as that in *Simmons v. South Carolina*, 114 S. Ct. 2187 (1994), which was rejected by the Supreme Court of Virginia for years before it was reversed by the United States Supreme Court. See Pohl and Turner, *If At First You Don't Succeed: The Real And Potential Impact Of Simmons v. South Carolina In Virginia*, Capital Defense Digest, Vol. 7, No. 1, p. 28 (1994).

⁴⁶ *Roach*, 1996 WL 88107 at *12.

⁴⁷ 114 S. Ct. 2187 (1994).

⁴⁸ *Roach*, 1996 WL 88107 at *13 (citing *Wright v. Commonwealth*,

“suspect” and such a classification need only “rationally advance[] a reasonable and identifiable governmental objective[,]”⁴⁹ which the court found in the objective of eliminating improper speculation by the jury. The court justified the anomalous result by claiming that lifetime parole ineligibility is relevant to the issue of the defendant’s “future dangerousness” but parole ineligibility for a period of 25 or more years is not probative of this issue. This rationale is flawed, however, in that it fails to take into account the drop-off in recidivism after 25 years in prison and 25 years of aging and maturity. Although parole ineligibility for a period of years may not have the weight of evidence of parole ineligibility for life, it is relevant to that issue.⁵⁰

It is likely that “rational basis” is the correct equal protection standard to be applied since capital defendants ineligible for parole for a period of years are not a “suspect” class. However, to conclude that the rational justification for not requiring such jury instructions is that parole ineligibility for a period of years is not probative, either as mitigation or to rebut “future dangerousness,” directly contradicts the United States Supreme Court’s rationale in *Simmons*. Furthermore, as Roach contended, this distinction appears to be unreasonable in that it leads to anomalous results. It is difficult to see any impropriety in the jury’s

248 Va. 485, 487, 450 S.E.2d 361, 362 (1994), *cert. denied*, 115 S. Ct. 1800 (1995)).

⁴⁹ *Id.* at *13 (quoting *Schweiker v. Wilson*, 450 U.S. 221, 235 (1981) and citing also *Evans v. Commonwealth*, 228 Va. 468, 481, 323 S.E.2d 114, 122 (1984), *cert. denied*, 471 U.S. 1025 (1985)).

⁵⁰ “In assessing future dangerousness, the actual duration of the defendant’s prison sentence is indisputably relevant.” *Simmons*, 114 S. Ct. at 2194.

⁵¹ *Roach*, 1996 WL 88107 at *13.

consideration of the effect that a defendant’s incarceration might have on his “future dangerousness.” Such a consideration is an essential part of the jury’s determination of the existence of the “future dangerousness” aggravator. Thus it seems that the court’s stated objective is unreasonable and the classification fails even rational basis scrutiny. This ruling appears even more unreasonable in the face of the jury’s direct questioning as to the parole ineligibility of the defendant. By refusing to provide the jury with the factually correct information, and only telling the jury not to concern itself with what may happen after sentencing, the Supreme Court of Virginia has, in its own words, done “nothing more than invite the jury to speculate”⁵¹ on the probability that the defendant will be paroled from prison in a short period of time if the jury spares his life. In *Simmons*, the United States Supreme Court specifically admonished such a response by the trial court.⁵²

In the few pre-1995 cases that remain, defense counsel are urged to preserve the post-*Simmons* issues, including the equal protection claim.

Summary and analysis by:
Douglas S. Collica

⁵² “The jury was left to speculate about [the defendant’s] parole eligibility when evaluating [his] future dangerousness, and was denied a straight answer about [the defendant’s] parole eligibility even when it was requested.” *Simmons*, 114 S. Ct. at 2195. “Far from ensuring that the jury was not misled, however, [instructing the jury not to consider parole] actually suggested that parole was available but that the jury, for some unstated reason, should be blind to this fact.” *Id.* at 2197.

FRY v. COMMONWEALTH

250 Va. 413, 463 S.E.2d 433 (1995)
Supreme Court of Virginia

FACTS

On February 21, 1994, near the end of Exeter Mill Road in Chesterfield County, Virginia, Tony Leslie Fry shot a car dealer, Leland A. Jacobs, eleven times. He and his accomplice, Brad Hinson, had taken a Ford Explorer out on a test drive with the intent to steal it and to murder any salesperson who insisted on accompanying them. Fry stopped the truck on Exeter Road, feigning a need to check the spare tire. After Jacobs had exited the truck, Fry told him to “look at that owl.” When Jacobs turned his head, Fry shot him in the back. Fry fired a total of eleven shots into Jacobs’ head, chest, and abdomen.¹

Coincidentally, Officer David L. Suda of the Chesterfield County Police was looking for Fry on an arson charge when he confronted Hinson and Fry in the Ford Explorer on Exeter Road shortly after the killing. Hinson was driving. Suda approached the car and, upon noticing blood on Fry’s hand, asked Fry for an explanation. Fry said that he had hurt himself “playing in the woods.” Suda attempted to handcuff Fry, but Fry resisted. He ceased resisting, but reached for the glove compartment

stating he wanted to kill himself. Suda sprayed Fry with mace. Hinson immediately dove for the backseat of the truck and grabbed his coat, but he released it when Officer Suda drew his gun. He then exclaimed his innocence in the killing and led Suda to Jacobs’ body. Fry confessed to the killing and attested to Hinson’s innocence.² Once in police custody, Fry was polite, respectful and candid about his part in the killing. He was also very remorseful.³

Fry was nineteen years old when he shot Jacobs. He had an IQ of 77 and a dependent personality disorder. His mother abandoned him and he never knew his father’s identity. He was raised by his maternal great-grandmother, but grew up with few friends and was not involved in any extra-curricular activities, except for singing in the church choir. His schooling consisted of special education classes for the emotionally disturbed. Prior to the shooting, Fry had not engaged in violent conduct.⁴

Fry was indicted for capital murder for the willful, deliberate, and premeditated killing of Jacobs during the commission of robbery or attempted robbery while armed with a deadly weapon.⁵ Fry pleaded guilty at an arraignment on October 3, 1994. The court conducted a

¹ *Fry v. Commonwealth*, 250 Va. 413, 415-16; 463 S.E.2d 433, 434-35.

² *Id.*

³ *Id.* at 417-18; 463 S.E.2d at 435-36.

⁴ *Id.* at 417-19; 463 S.E.2d at 435-36.

⁵ *Id.* at 414, 463 S.E.2d at 434 (citing Va. Code Ann. §18.2-31(4) (Supp. 1994)).